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*"At the root of every legal question
is not an answer but a doubt."*

RULES OF THUMB FOR GUT DECISIONS: INTERNATIONAL LAW IN EMERGENCIES

by
Alfred P. Rubin

In my personal library there is a rather tattered and stained, leather-bound book published in 1741 by the British Admiralty and issued to Navy commanders. It is titled, *Extracts from the Several Treaties Subsisting Between Great Britain and Other Kingdoms and States of such Articles and Clauses as Relate to the Duty and Conduct of the Commanders of the King of Great Britain's Ships of War*. It is 264 pages long and contains in elegant print the pertinent articles of all the treaties with France, Spain, the Netherlands, Belgium (then called the Austrian Netherlands), Portugal, Russia, Sweden, Denmark, Savoy (now expanded to a united Italy), Turkey, Morocco, Algiers, Tripoli (now called Libya), and Tunis. The oldest is with the Austrian Netherlands, and dates to 1495. The compilation is current as of 1741. Some of the articles deal with the rights of merchants as neutrals when the other treaty party is exercising belligerent rights, such as blockade, against a third state; some with the incidents of peaceful seaborne trade, some with belligerent rights as between the treaty partners themselves, such as

provisions dealing with contraband and prize court proceedings. Such a compilation was not only useful but a practical necessity in 1741 if Great Britain were to give her navy the job of protecting British commerce at sea.

It would be both undesirable and impossible to compose an equivalent compilation for our naval commanders today. It is impossible to furnish our naval commanders with a compilation of all the treaty articles that might pertain to their duties because of the growth of the international community and the proliferation of treaties and executive agreements pertinent to seaborne commerce and the laws of war, and other matters of possible immediate concern to naval commanders, like individuals' rights to political asylum. To serve a function equivalent to the 1741 compilation a current volume would have to be huge, cross-indexed, and accompanied by interpretive legal memoranda and philosophical analyses of the impact of treaty commitments on third parties, the implications of inconsistent obligations owed to the same party, different parties, international organizations, and parties with reservations or

42 Naval War College Review

qualifying interpretations to multi-lateral documents. And it would quickly be realized by the naval commanders that this set of volumes (which is what it would turn out to be) would be incomprehensible without more study than time and energy would permit. Besides, it would probably be useless in an emergency not squarely envisaged in some pertinent treaty. Since emergencies are never squarely envisaged, since it is never clear that any particular treaty is pertinent to the exclusion of others, and since questions of interpretation arise over the simplest legal language, a modern compilation could not serve the function of the 1741 compilation.

It would also be undesirable. It is no longer true that the rules of international law are codified in documents that make sense to an intelligent and experienced person who has not devoted considerable time and effort to their study. Scan simply the 1958 Geneva Convention on the High Seas¹ and consider that any American compilation like the 1741 book would not include the current version of the draft Convention of the Third United Nations Conference on the Law of the Sea (UNCLOS III)² because that draft is not yet (and, indeed, may never be) a treaty ratified by the United States. But to conclude from that fact that the rules of 1958 still bind the United States and the flag states of all the other parties' vessels our Navy ships might encounter on the high seas would be totally wrong. The new draft embodies practices and interpretations accepted as proper, even if not formally binding, and the burden would be on the state relying on the 1958 Convention's formulation in case of doubt to show that it had not been changed by universal acquiescence in some new practice as evidenced by the current draft. Indeed, the extension by the United States itself of an exclusive fishery zone reaching two hundred miles from our coasts was accomplished not by a revision of the 1958 Convention

but by legislation against the advice of the State Department.³ Moreover, not all maritime states are parties to the 1958 Convention, and the relationship of that attempt to codify the law of the sea to states who rejected the codification, for whatever reason, is complex and cannot easily or quickly be summarized. And what is true for that single Convention is true for many.

When I contemplated this situation, it occurred to me that a general rule existed which all seagoing officers learn sooner or later: On questions of treaty interpretation, only Washington is capable of giving guidance. The naval officer who tries to act as his own lawyer, like the lawyer who tries to handle his own case, treads dangerous ground and will probably hang his client.

And what is true for treaty interpretation is true for all other questions of international law; perhaps even more so when there is no definitive text at all to refer to, or only a text like a statute, or a UN General Assembly resolution, or a draft unratified treaty, that is written for other purposes and aimed at other people. It is not rational to assign a competent international lawyer to each ship, not because there is a great shortage of competent international lawyers—and the calibre of military lawyers is at least as high as the calibre of lawyers in our society in general, including its academics—but because a competent international lawyer himself will know that at the root of every legal question is not an answer but a doubt. A learned analysis of the precise legal risks of alternative courses of conduct in an emergency is not only useless in practice, it is impossible.

This is not to say that guidance, even elaborate and detailed guidance, should not be attempted, but that the utility of complex rules of engagement and equivalently detailed orders is limited to the circumstances in which the naval commander has the time and opportunity to

use them. They may fill a gap between an emergency situation where quick and decisive action (or a decision not to act) is imperative to save life, protect a command, or assert a major national interest, and the situation in which there is time and opportunity to seek the guidance of a headquarters equipped to give it. But they cannot themselves guide a naval commander who must make a quick decision.

What is needed is not definitive guidance, then, but a few, easily grasped, rules of thumb; guidance for guts when a gut decision must be made.

Gut decisions by naval commanders are usually well based in their experience and general knowledge of American interests and policies, but cannot serve without rules of thumb when legal interests are at play. Our guts frequently deceive us. An anecdote, slightly inapropos, may be worth preserving:

In 1965 I was the lawyer in the Office of the Secretary of Defense charged with responsibility for legal aspects of our Southeast Asian operations. My principal client was John McNaughton, a native of Pekin, Illinois, then Assistant Secretary of Defense (International Security Affairs), who in private life had been a professor of law (but not international law) at the Harvard Law School. At a meeting in his office he asked for the views of his staff, including myself as his lawyer, on a proposal that had been referred to Secretary McNamara by President Johnson: Should we mine Haiphong harbor? As was typical in those days, we had not been given advance notice of the subject of the meeting, thus I had not checked the SEATO Treaty or other documents when I was suddenly asked whether it was legally required that the United States notify its allies before undertaking the operation. McNaughton's view was that it was undesirable as a matter of policy to notify our allies. Notice was tantamount to asking for objections, they might object and raise

political problems even if legally we would be justified in the mining. Confronting them with a *fait accompli* would be easier for them to accept and explain to their own constituents than what might appear to be a concurrence construed out of their failure to object.

I disagreed. My view was that the risks to their merchant ships in Haiphong, which might be delayed there past the moment our mines were armed even if our notice were given before then, were significant, and that our failure to notify them before the mines were laid would, if they then objected, either result in our delaying the arming of the mines (in which case we might as well have given them prior notice), or create serious political problems ultimately resulting in their drawing back from supporting us in Vietnam, which at that time was still considered possible and desirable. I thought that the consultation provisions of the SEATO Treaty might apply, but without the text to check and no time to do the necessary legal research into the negotiating history of the Treaty and the terms on which it was submitted to our Senate for advice and consent, I could not be sure of my view of the law.

"Is it just your guts then, Rubin?", he asked.

"Yes, sir," I admitted.

"Well, then" he replied (and I will probably always remember his precise words), "your guts and my guts just disagree on this one." The serious meeting ended in laughter.

In retrospect, I don't know whose guts were closer attuned to political and legal realities; I think mine were, but that opinion rests on later research and knowledge of what in fact happened in Vietnam, including our allies' increasing mistrust of our military and political judgment there, things that neither of us could know at the time. It was my impression that the decision then not to mine Haiphong harbor was made on other bases, possibly wrongly, and I

44 Naval War College Review

don't know what impact advance notice to our allies might have had. McNaughton is, tragically, dead and cannot give us his version of the anecdote.

The point is the need for some rules of thumb to help guide our guts; to help focus the issues and give us a handle on the legal and policy implications of military action. With this in mind, I suggest the following fundamental principles as possibly useful to naval commanders.

1. *Reciprocity.* A fundamental rule of the international legal order is the equality of all states, big and small, before the law. Great strength may give us great political responsibilities, and possibly even some legal rights and powers not available to lesser states, but in general, and as a matter of basic principle, rights we assert for ourselves in the absence of agreement by others are rights that all other states can assert against us. If an American naval commander insists on sending a boarding party to a Peruvian gunboat suspected of harboring an American fugitive, a Peruvian commander (indeed the commander of a legally equal Ecuadorian vessel) will sooner or later be asserting the same right against an American naval vessel. To argue then that we have rights against our legally equal Latin American neighbors that they do not have against us is almost certain to have major political implications of the utmost gravity. The fact that we are bigger and stronger than our Latin neighbors will not prevent them from expropriating American property, or even, as in the case of the *Pueblo* off North Korea, seizing an American military vessel. Collective political action through the Organization of American States might be their non-military response. Remembering the rule of reciprocity would dampen down the understandable enthusiasm of an American naval commander unduly intent on accomplishing a law-enforcement mission.

2. *Minimal Force.* It is fundamental to the international law of war, as well as to wise management, that unnecessary suffering and destruction is improper. Whether a use of force to "teach a lesson" is justifiable as "reprisal" or on some other basis must rest on particulars. It is a potentially difficult legal question to which the answer normally would be no. The international law of self-defense, which was definitively formulated by Daniel Webster in diplomatic correspondence with Lord Ashburton, the British Minister in Washington, in 1842⁴ justifies only the minimum force when the necessity is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁵ International law, like the law of many states in the United States, requires a threatened party to retreat before the threat as long as retreat is safe before using force in self-defense. This is not to say that there are no circumstances in which a naval commander may use force beyond the minimum necessary to safeguard his command, only that as a rule of thumb he should not; if he does he is likely to involve the United States in serious complications, an escalating use of force by others, and will find his superiors, to their dismay, forced to apologize for action he thought was justifiable.

3. *Effectiveness.* In the long run, legal relationships flow from the facts, not from the technical labels we frequently use to disguise unpleasant reality. Thus, if a rebel group that has control of a foreign vessel is labeled a "pirate" or "terrorist" group by the recognized government against which it is fighting, and the United States does not recognize the legitimacy of the rebel government or its legal capacity to commission naval vessels, to the degree the labels represent a political ideal of the defending government or the United States and not the facts, it is the labels that will ultimately be changed. An American naval commander

capturing a Chinese Communist gunboat in 1970, when the United States recognized the Chinese Nationalist Government in Taiwan as the sole Government of China, and that Government called the Peking authorities mere bandits, would create legal and political complications that might help clarify the law, but at the cost of his reputation for common sense. The reality of Communist control of the mainland of China actually determined American relations with Peking as early as 1949, and we accorded Chinese Communist "volunteers" the privileges of legal belligerents in Korea from the first days of their entry into that conflict in 1951, despite mainraining for political reasons a ser of legal labels that made that status inconsistent with our public legal position. This is not to say that there are no legal effects to unreal labels, only that as a rule of thumb, in the absence of express guidance from above, naval commanders should rest their evaluations of reality on reality itself, not on subtle and complex political and legal considerations that may require the formal use of deceptive legal labels for a time.

4. *Legal labels and "Autointerpretation."* Legal words are almost always deceptive even to lawyers. President Ford is a lawyer, and he called the Kampuchean naval force that seized the *Mayaguez* "pirates." The State Department quickly "clarified" the situation denying that the President had intended "piracy" in the sense of the 1958 Geneva Convention on the High Seas, thus denying that the legal results of the label should flow. In fact, there is ample historical and legal basis for President Ford's use of the word,⁶ but that use is not the one purportedly codified in the 1958 Geneva Convention on the High Seas.⁷ There seem to be at least six quite different conceptions of "piracy" that have been used from time to time by international lawyers to justify suppressive action, some of them wholly

outdated, merely political, or simply irrelevant to the situations to which their legal implications are occasionally sought to be applied; President Ford was apparently using the word without a clear idea of which sense was intended. As a rule of thumb, then, naval commanders should beware of drawing legal results from labels used by newspapers, staff lawyers, or even the President of the United States.

The unwisdom of acting on the basis of labels rather than on the basis of facts is reflected in a deeper conception familiar to international lawyers: Auto-interpretation. Since all states are equal before the law, and there is no formal legislative body and only a very limited judicial competence in the international legal order, the legal classification of facts on the basis of which action is taken by states must always in the first instance rest on "autointerpretation": The classification made by the acting state's responsible officials for their own purposes. But autointerpretation is *not* a definitive legal determination of the true relationships and their legal results.⁸ States have apologized for acts taken pursuant to self-serving autointerpretations which in retrospect seemed more like mere adversary briefs than convincing analyses. The final determinations are made by the political pressures of the entire international community and by history. Thus naval commanders, like international lawyers, should approach the most convincing legal arguments with a certain degree of skepticism. A firm position stated by a Soviet vessel that the United States has no legal right to retain custody of a fleeing Soviet sailor reaching an American vessel on the high seas cannot legally be more than a Soviet autointerpretation of the law. It cannot in theory or practice be a determination of the law however persuasively argued. And, similarly, in the absence of an order absolving an American naval commander of responsibility for his action,

46 Naval War College Review

even a legal position uttered by the United States Government is a shaky basis for action. Wise policy must be influenced by legal perceptions, just as it must reflect economic interests and military interests, but the self-serving legal briefs of only one party are not a solid basis for decisionmaking, even in legal theory.

5. *Supremacy of the Law.* It may seem odd after this analysis to refer to the law as supreme, but it is necessary. The final determinations made by politics and history are devastating. To ignore the inherent weakness of autointerpretations and adversary briefs before the glare of publicity, counterargument and the many legal and political actions that states take to keep each other in line would be foolish indeed. But to ignore the obvious fact that the final determinations of the law made by the world community and by history deal severely with those who ignore the law is to be blind indeed. The guidelines of reciprocity, minimal force, and the ultimate effectiveness of facts, coupled with a healthy skepticism about glib legal labels and an appreciation of the inherent doubts that underlie all legal argument until history has had a chance to deliver its judgment, seem appropriate. They lead to caution in action, which is all to the good when real lives and property are at stake, but do not inhibit necessary action in a true emergency.

So far, we have been addressing international law at such a basic level that the degree of generality may obscure the practical utility of the law. It is possible to be more specific.

6. *Territoriality.* The prehistoric basis for our nation-state system probably rests on religious and ethnic-family and tribal feelings rooted in our deepest inheritance; part of our wiring rather than our software programming. It is also possible that to some degree our emphasis on territorial integrity is built into the system. International law

takes account of both in allowing states to make rules for their nationals wherever they may be, and to make rules for everybody, foreigners as well as nationals, within the territory politically dominated by the rule-making and rule-enforcing authority, the government. The system is more complex than it seems; there are territory-less rule-making and rule-enforcing organizations, like churches; there are exemptions from territorial enforcement for transiting diplomats and others; there are overlaps and underlaps. Fundamentally, however, the territorial sovereign is supreme in his territory, and his territory includes his internal waters, territorial seas and, for some purposes, wide belts of fisheries and other exploitation zones. When a vessel of another state appears in any of those zones, even if there is no treaty governing the situation, as is in fact the case regarding extended fisheries zones today, and even if for some purposes the zone is labeled part of the high seas, an overlap of sovereignty occurs. The flag state of a vessel has the jurisdiction in that vessel necessary to allow the master to exercise the authority he needs without fear of a claim against him for false imprisonment or assault when he disciplines a crewman or passenger. Indeed, from earliest days vessels on the high seas and in foreign ports were conceived as part of the territory of their country of origin for purposes of internal discipline and property rights. But a vessel is not a part of the flag state's territory; the analogy loses its persuasiveness quickly when contemplating air space above the vessel and the routine exercise of port-state customs and immigration authority on board visiting private vessels. The extension of territorial jurisdiction is built on a fiction, limited by the principle of effectiveness, and yields in general to the prescriptions of the territorial waters or ports. Even though warships, by long usage and mutual

acquiescence, are normally considered immune from the territorial sovereign's enforcement authority, in case of conflict their only recourse is to leave the territorial waters. In general, in these days of rising international claims to law-making and law-enforcing authority for special purposes in large areas of what formerly were considered to be the high seas, claims which the United States makes also, principles of reciprocity would normally require an intruding military vessel to leave rather than contest any assertion of right based on the extension of territorial jurisdiction seaward. There may be cases in which passage is forced, but those must be dictated by higher authority, which will presumably have considered the impact of reciprocity, minimal force, and effectiveness, as well as the relative persuasiveness of the autointerpretations of all states concerned, before issuing the orders. But as a rule of thumb, a naval commander can no longer confidently oppose territorially based claims with assertions of historical rights based on glib labels like "high seas" and "freedom of navigation" or even "innocent passage."

7. *"Functional" Sovereign and Diplomatic Immunities.* Traditional perceptions of the immunities of diplomats and of arms of the sovereign, including naval vessels, have been rapidly changing in the past few years. While there can be no doubt of the illegality of the Iranian seizure of American diplomatic and consular personnel and even private American nationals in Teheran in 1979, the 1961 Vienna Convention on Diplomatic Relations ended whatever had remained of theories of absolute diplomatic immunities and replaced it, to the extent developing conceptions of law outside the treaty framework had not already done so, with a conception of "functional immunities": Immunity from host-state territorial jurisdiction limited to what was necessary for the accomplishment

of the diplomatic mission. Old catch-phrases, like "train of the Ambassador," and the idea that an embassy is a little bit of foreign territory enclaved in the host state, to the extent they had lived till then, died. The United States agrees with the changes, and it would do us no good to resist them. Thus, when a foreigner seeks asylum from his own government in an American embassy, the right of the United States to grant that asylum is severely limited. Occasionally, heart-wrenching circumstances, as with Soviet religious dissidents in Moscow, or Cardinal Mindszenty in Budapest, lead the United States to permit an asylum situation to arise where there is really very little legal basis for our position. But those are rare and decided at the highest political levels in the United States. A naval commander faced with a fleeing foreigner may be in a somewhat better practical position if he can leave the territorial waters of the host state, but his legal position is also weak. As with embassies, he has no legal immunity from the actual prescription; he must rest on his functional immunity from local enforcement action. He may violate international law by not paying due regard to the law of the coastal state.

This is not to say that, as a rule of thumb, asylum should always be denied. There are humanitarian concerns that permit it. But the naval commander must be aware that his immunities are limited and grave difficulties may result if he cannot defend his command before the fury of a host state convinced that its jurisdiction and hospitality have been abused. Of course, if the asylum incident occurs on the high seas or within American waters, no such conflict of jurisdiction exists and rescue operations and asylums are governed by American law alone in the first instance.

Another modern trend is the increasing restriction on the immunities of foreign states acting in a commercial capacity. The fact of a ship being

48 Naval War College Review

designated a naval vessel by the law of its flag state represents today only an autointerpretation of facts that a foreign state or its national court might well want to look at from a different point of view. The United States has been in the forefront of states denying sovereign immunity from law suits based on the commercial activities of foreign governments, and the concept of "commercial" is held to rest on the nature of the operation, not its purpose. Combat operations and legislation are regarded as in their nature governmental; routine navigation and local activities that are typical of any ships, not just public vessels, are regarded as in their nature commercial. Thus, buying ships' stores even for a warship is regarded in the United States as a "buying," not as a governmental activity in support of combat operations, and a common law suit can be brought against the purchaser to enforce the purchase contract. It has not yet reached the point of permitting the arrest of a warship in an admiralty proceeding to enforce a lien, but the trend is heavily in that direction. The fact that the United States might stop short of setting such a precedent is not necessarily an indication that foreign countries, which have watched the American initiative with some apprehension, will stop at the same point we do when they evaluate their own interests and come to their own autointerpretations of the law.⁹

8. *Humanitarianism.* There is a serious question in the minds of international lawyers whether humanitarian principles, whatever they may be, form part of the legal obligations of states. Strong arguments can be made both ways. As a rule of thumb it is probably true that things done in derogation of a foreign sovereign's jurisdiction in the interest of saving life are not likely to raise serious problems, but that derogations to save property are. The British historically raised the issue over slavery; a right to life issue to them and a right to

property issue to the Portuguese, Americans and others. The result was a victory in theory for property, and a victory in practice for the British, who marshalled public support and political pressures until slave trading states agreed to change their laws and to permit, by treaty, the British to enforce antislave-trade rules on their vessels. There are, of course, times when equivalent problems arise today, for example over the right of a foreign national to flee oppression not linked to life-threatening mob action but to his own government's abusive exercise of its jurisdiction. In those cases, the intervention of American vessels to help the fleeing foreigners is frequently viewed as an interference in the foreign state's internal affairs—its territorial integrity and the ancient link a state has with its nationals wherever they may be. In general, the greater the political motivation for the flight, and the less the immediate life-threatening emergency, the more dubious the justifiability for American action, even as a passive receiver of fleeing persons. If there is any rule of thumb in this area, it would seem to be equivalent to the rule we all apply when we see our neighbors quarreling or beating each other and their children; we don't interfere unless the situation becomes shocking to the point that we cannot simply stand by and watch. At that point, regardless of the law the risks seem worth it.

9. *Mind Your Own Business.* One of the most profound rules of the international legal order, so much so that it has a Latin phrase to go with it, *res inter alios acta*, is that a quarrel between others is legally of no concern to us. There is no basis for an international claim unless a legal interest of the claimant is violated; there is no basis for diplomatic or military action unless that basis can be found in the law. In international law, phrases like "honest broker" and "friend to all" have no force. The institutional arrangements

for community action rest on the consent of the states to whom the complaint or military action is addressed. That consent has been given in the adherence of nearly all states to the Charter of the United Nations, but that consent extends only to collective action using the organs of the United Nations and to individual states deriving their authority from United Nations legal action, as the United States and other states did in Korea in 1950. Regional organizations, like the Organization of American States, have a role to play in resolving international disputes and occasionally authorize military action. The quarantine of Cuba in 1962 was authorized by the Organization of American States, thus it was possible indirectly to construe the entire action as occurring with Cuban consent, Cuba being still a member of the Organization. There were, and are, doubts as to the legal power of the Organization to take enforcement action. The Soviet Union is not a member, yet the quarantine involved interference with Soviet vessels. Moreover, enforcement action is the exclusive prerogative of the Security Council of the United Nations under the Charter to which all members of the Organization of American States are also parties. But those doubts are subtle, and technical, and were unnecessary to resolve once it was clear that the United States had a legal

position that assured it of the support of its Latin American neighbors in the action against Cuba and the Soviet Union in the Western Hemisphere. In that case, the rule of thumb may have worked better than a more technical and detailed analysis of the law would have permitted. The rules of thumb thus, that require naval commanders to mind their own business and limit self-defense actions to true emergencies, do not operate to prevent collective action; rather they require collective action instead of individual action when a quarrel between others threatens general community interests. They withhold from any single state, including the United States, the legal power to act as a universal policeman, and strengthen the collective mechanisms that disperse responsibility for keeping the peace among all the members of the community and limit the risks of confrontation.

The foregoing listing of rules of thumb for gut decisions is not exhaustive, but I hope they hit the major points and will be useful to operating naval commanders.

BIOGRAPHIC SUMMARY

Professor Rubin is the Charles H. Stockton Professor of International Law at the Naval War College.

NOTES

1. T.I.A.S. 5200, 13 U.S.T. 2312, 450 U.N.T.S. 82.

2. UN Doc. A/CONF. 62/WP.10/Rev. 3.

3. The legislation is P.L. 94-265, The Fishery Conservation and Management Act of 1976. The contrary advice of the State Department may be studied in U.S. House of Representatives, Hearings before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the Committee on Merchant Marine and Fisheries, *Fisheries Jurisdiction* (11-14, 18-20, 27 March 1975), serial no. 94-4, 94th Cong., 1st Sess. pp. 47-50, 86-154.

4. R.Y. Jennings, "The Caroline and MacLeod Cases," *American Journal of International Law*, v. 32, 1938, p. 82.

5. John B. Moore, *Digest of International Law* (Washington: U.S. Govt. Print. Off., 1906), p. 414.

6. For some historical instances in which the British labeled as "pirates" the military arm of some Malay Sultanates which they were treating in other ways as states in the international legal order, see Alfred P. Rubin, "The Use of Piracy in Malayan Waters," *Grotian Society Papers* 1968, 1970, p. 111. In 1828 Commodore Sir Thomas Staines burned or captured eleven "piratical vessels" in Grabusa Harbor (Ionian

50 Naval War College Review

Islands, now part of Greece) whose depredations had been committed while they flew the Ionian flag and had privateer licenses from the British-protected government of the Ionian Island. Naval Records Society, *Piracy in the Levant, 1827-8; Selected from the Papers of Admiral Sir Edward Codrington, K.C.B.*, v. 72, 1934, pp. 42-52, 67-70, 246-248. The same perception colored European treatment of the Barbary states in the early 19th century. See Mössner, "The Barbary Powers in International Law," *Grotian Society Papers* 1972, p. 197.

7. On the hopelessly confusing codification of 1958 see Alfred P. Rubin, "Is Piracy Illegal?" *American Journal of International Law*, January 1976, p. 92. Distressingly, the 1958 codification is repeated more or less verbatim in the current draft before UNCLOS-III cited above at note 2.

8. The leading article on this is Leo Gross, "States as Organs of International Law and the Problem of Autointerpretation," in George A. Lipsky, ed., *Law and Politics in the World Community* (Berkeley: University of California Press, 1953), pp. 59-88. Professor Gross first popularized the word "autointerpretation" to label this complex but fundamental conception.

9. The Foreign Sovereign Immunities Act of 1976, 28 U.S. Code Secs. 1330, 1602 sq. provides that the state itself shall not be immune from the jurisdiction of courts of the United States in any case in which the action is based on "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States" (Sec. 1605(a)(2)). It also provides that a foreign state shall not be immune "in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state" (Sec. 1605(b)). "Commercial activity" is defined in the act to include "a particular commercial transaction" and says further that "The commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." (Sec. 1603(A)(d)). Legal questions about the constitutionality and precise meaning of these provisions are only now beginning to be decided by American courts. Foreign countries enacting their equivalent statutes are not bound by the American Constitution or American interpretations of the American statute.

A Soldier's Lament

"A soldier should be sworn to the patient endurance of hardships, like the ancient knights; and it is not the least of these necessary hardships to have to serve with sailors."

Attributed to Field Marshal Montgomery

